IN THE

Supreme Court of the United States

OCTOBER TERM, 1976.

No. 76-1149

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

JARIUS PIPHUS, A MINOR AND GENEVA PIPHUS, GUARDIAN AD LITEM FOR JARIUS PIPHUS,

Respondents.

JOHN D. CAREY, ET AL.,

Petitioners,

vs.

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, A MINOR AND CATHERINE BRISCO, GUARDIAN AD LITEM FOR SILAS BRISCO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To: The Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners, John D. Carey, et al., pray that a writ of certiorari issue to review the judgment and opinion of the United States

Court of Appeals for the Seventh Circuit entered on November 22, 1976 reversing and remanding the decision of the United States District Court for the Northern District of Illinois, Eastern Division.

OPINIONS BELOW.

The opinion of the Court of Appeals reversing the decision of the District Court is reported at 545 F. 2d 30. It is reproduced in Appendix A to this Petition at p. A1.

The memorandum opinion of the District Court was not reported. It is reproduced in Appendix A to this Petition at p. A5.

JURISDICTION.

The decision of the Court of Appeals was entered on November 22, 1976. The jurisdiction of this Court is invoked under the provisions of 28 USC § 1254(1).

QUESTIONS PRESENTED.

1. Whether the decision of the Court of Appeals, holding that plaintiffs who prevail on a claim of violation of civil rights are entitled as a matter of law to general compensatory damages absent a showing of injury or pecuniary loss, substantially conflicts with the holdings of other Circuit Courts of Appeals which permit a denial of such damages or allow an award of only nominal damages?
2. Whether the Court of Appeals erred in substituting its own judgment for that of the District Court, sitting as the trier of facts, when it determined that the plaintiffs were not entitled to compensatory damages because they, respectively, failed to establish any injury and failed to quantify their damages?

STATEMENT OF THE CASE.

These are consolidated cases wherein the minor plaintiffs, Silas Brisco and Jarius Piphus, seek relief upon a claim that their respective suspensions from school violated their constitutional due process rights.

a. Silas Brisco.

Silas Brisco attended the fifth grade at the Barton Elementary School in 1972-1973 school year. During this period of time, the school was in a transition from a predominantly white to predominantly black enrollment. Barton School officials were aware of physical violence connected with gang rivalries and recruitments in the school and that, in addition, a single earring was a symbol of certain gang membership. During the 1972-1973 school year at Barton, black male students began to attend the school wearing these earrings. School officials determined that in the interest of student safety, male students would be prohibited from wearing these earrings.

Following the establishment of the earring prohibition rule, various male students were orally informed of the rule and were warned that continued wearing of the earring could result in suspension. Silas Brisco had actual notice of the earring ban. In May of 1973, school officials noticed the appearance of certain earrings denoting gang membership in a branch of the Disciples street gang, the "Boss Pimps Disciples." The particular earring which Brisco wore was recognized by school officials as denoting officership in that gang.

In May of 1973, Silas Brisco was told to remove the earring or face suspension. He refused to do so and was suspended for a portion of the school day. Thereafter, his mother met with the District Superintendent and Brisco agreed to remove the earring and was readmitted.

After school reconvened for the Fall semester, 1973, Brisco again wore the earring to school on September 11, 1973 and during the course of the school day was brought to the principal's office where the principal and assistant principal directed him to remove the earring. Brisco refused. The principal then conferred with the District Superintendent and informed Brisco that he must comply with the rule or face suspension.

When Brisco refused to remove the earring, the assistant principal left the office area, telephoned Brisco's mother and wrote up a suspension report form. When Mrs. Brisco came to the school and conferred with the school officials, she was informed that her son would be suspended if he continued to refuse to comply with the earring rule. Mrs. Brisco supported her son, and the twenty-day suspension was then imposed. After having served 17 days of the suspension, Brisco was voluntarily readmitted during the pendency of a Motion for Preliminary Injunction in this action.

b. Jarius Piphus.

Jarius Piphus was a student at Chicago Vocational High School (CVS) during the 1973-1974 school year. The written rules of CVS prohibited cigarette smoking and bringing intoxicating substances on to school property. Jarius Piphus had actual notice of these rules.

On January 23, 1974, the school principal observed Piphus and another student passing an irregularly shaped cigarette between them. As the principal neared the boys, he smelled smoke which he believed to be the odor of marijuana. The principal also observed Piphus attempting to pass cigarette papers to the other student. When the boys saw Mr. Brown, they discarded the cigarette and no attempt was made to recover the cigarette. Piphus admitted smoking the cigarette but denied that the substance he was smoking was marijuana.

The principal accompanied the two students to the school's disciplinary office and there instructed the assistant principal

to impose the "usual procedure" of a twenty-day suspension. Although the principal admits that it was his decision to suspend Piphus, the formal suspension was effected by the assistant principal. At the time of the suspension, the assistant principal informed Piphus that he was being given a twenty-day suspension for smoking cigarettes. Piphus later learned that the reason also including class cutting.

Subsequently, two meetings were held among the school officials, Mr. Piphus, members of his family, and legal aid representatives. These meetings were not hearings but rather were for the purpose of explaining the previous actions taken. At the second meeting, the legal aid representatives were excluded when they attempted to tape record the session. Upon administrative review by the District Superintendent, Piphus' suspension was reduced to five days. Concurrently, Judge Bauer entered a temporary restraining order requiring the readmission of Piphus. He missed eight days of classes.

c. Findings.

The District Court found that the suspensions in question raised two legal issues: whether the students were given sufficient prior notice of conduct which was prohibited, and whether adequate hearings were held at the time each boy was suspended.

The Court went on to find that both Brisco and Piphus had actual notice of reasonably narrow regulations of prohibited conduct. Because both suspensions potentially exceeded ten days, both boys were found entitled to receive a formal evidentiary hearing, which should include:

1. Pre-hearing notice, including a short summary of the evidence upon which the administrator intends to rely.
2. To be represented at the hearing either by counsel or other responsible advocate.
3. To present witnesses on his own behalf and cross examine witnesses.

4. At his own expense, to make a tape recording or transcript of the hearing.
5. An impartial hearing officer to preside.

Accordingly, both Brisco and Piphus failed to receive adequate disciplinary hearings; the decisions to suspend both of them were made by their major factual accusers; neither had an opportunity to present maningful evidence; conferences were held following the decision to suspend them; and in the case of Jarius Piphus, his attorneys were excluded from a post-suspension conference and not allowed to make a tape recording of the conference.

Each plaintiff is entitled to a declaration that his suspension in question was unconstitutional.

Each plaintiffs' school records should be corrected to expunge any reference to these suspensions.

None of the defendants acted maliciously in enforcing the disciplinary school policies against the plaintiffs, and the defendants undoubtedly believed they were protecting the integrity of the educational process.

The defendants were nonetheless not immune from monetary liability because under the "*Linwood* Rationale"[1] defendants should have known that the plaintiffs were entitled to some type of an adjudicative hearing.

An award of damages must be based upon some proof to a reasonable degree of certainty. Plaintiffs put no evidence into the record to quantify their damages. In addition, plaintiffs put no evidence into the record which could form a basis of even a speculative inference measuring the extent of their respective injuries. Damages, accordingly, denied due to a complete lack of proof thereof.

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On plaintiffs' post-trial motions, Judge McLaren reopened the issue of damages and the plaintiffs submitted arguments and

1. *Linwood* v. *City of Peoria*, 463 F. 2d 763 (7th Cir. 1972)

exhibits in support of an award. Following the death of Judge McLaren, the case was assigned to Judge George N. Leighton; and on April 6, 1976, he denied the plaintiffs' motions, citing the same reasons cited by Judge McLaren.

Plaintiffs appealed the trial court's failure to award general compensatory damages and the trial court's failure to clearly grant the requested declaratory and injunctive relief.

The Seventh Circuit Court of Appeals held for plaintiffs-appellants on all issues. Significantly, the Court held that plaintiffs whose civil rights have been violated are entitled to recover general compensatory damages "inherent in the nature of the wrong," even though the plaintiff has failed to establish individual injury or pecuniary loss.

REASONS FOR GRANTING THE WRIT.

The Court of Appeals' holding that general compensatory damages are mandated in a civil rights action brought under 42 USC 1983 without proof of injury is a compelling reason for the Supreme Court of the United States to grant a Writ of Certiorari in this case. The District Court, as the trier of fact, found that plaintiffs had neither established the injury nor quantified their damages with sufficient particularity and were therefore not entitled to damages. The Court of Appeals reversed and ruled as a matter of law that when a deprivation of civil rights has been established, a plaintiff is absolutely entitled to an award of general compensatory damages even in the absence of an individualized injury and even if no pecuniary loss is shown.

This holding of the Circuit Court of Appeals for the Seventh Circuit is clearly in conflict with decisions of other Circuit Courts of Appeals on the same issue. The other Circuit Courts of Appeals and district courts are also in conflict as to the proper rule of damages to be applied. In *Smith* v. *Losee*, 485 F. 2d 334 (10th Cir. 1973) the Court of Appeals for the Tenth Circuit reversed an award for general compensatory damages, while affirming a finding that an associate professor of a state junior college had been wrongfully discharged and denied tenure when he had been in lawful exercise of his first amendment right of free speech. On the issue of general compensatory damages, the court sitting *en banc* held, at page 344:

> As to proof of damages, the record contains no evidence to support an award of general damages. As to this matter, plaintiff testified that he attempted to find a teaching position at other schools but was unable to do so. He did find another position with the state at a comparable or better salary. He is entitled to no damages just by reason of a change of jobs. There was no showing as to any effect resulting from the inability to find a teaching position. There was evidence that he was, in the words of the trial court,

> harassed by defendants Losee and Barnum. However, there is no pendent cause for defamation or any related cause. Many, if not all, of the incidents complained of appear to have taken place after the discharge was announced, although under the record it is difficult to determine just when the actual termination was effective. We must hold that the award of general damages was without adequate basis in the facts, and must be set aside.

In the case of *Magnett* v. *Pelletier*, 488 F. 2d 33 (1st Cir. 1973), the Circuit Court of Appeals for the First Circuit affirmed the propriety of nominal damages for a violation of civil rights where no right to compensatory damages as a result of injury had been shown. The Court directed that a "nominal" award of $500 could not be regarded as nominal damages and that if nominal damages were determined to be proper, the award should be reduced to the traditional sum of $1.00. The Court stated as follows at page 35:

> Nominal damages are a mere token, signifying that the plaintiff's rights were technically invaded even though he suffered, or could prove, no loss or damage. *Chesapeake & Potomac Tel. Co.* v. *Clay*, 1952, 90 U.S. App. D.C. 206, 194 F.2d 888; "a small or token sum awarded to a person who has been wronged but who has not shown such an injury as to be entitled to compensatory damages." Webster's Third New International Dictionary (1968). Other dictionaries use the word "trifling." E.g., Black's Law Dictionary 469 (Rev. 4th ed. 1968); Bouvier's Law Dictionary 2353 (3rd rev. 1914). If a compensable injury has been shown, compensatory damages must be given; if not, nominal damages should not be used to compensate plaintiff in any substantial manner, since he has shown no right to such compensation. We do not accept those decisions that have awarded as nominal damages more than a token amount. Five hundred dollars charged against an individual police officer is no mere token.

In another First Circuit Court case, *Cordeco Dev. Corp.* v. *Vazquez*, 539 F. 2d 256 (1st Cir. 1976), the Court of Appeals affirmed an award for $1.00 damages in an action for violation

of constitutional rights and recognized that a mere breach of a duty does not establish entitlement to general compensatory damages since liability will not suffice to prove the amount of damages and since speculative inferences in lieu of evidence are impermissible standards of evaluation. In strong language regarding damages the Court stated at page 262:

> And with respect to the amount of damages, while a plaintiff need not demonstrate the amount of damage with mathematical precision, it must provide sufficient evidence to take the amount of damages out of the realm of speculation and conjecture. As the district court properly found, plaintiff has here failed to meet that burden. (Citations omitted.)

The holding of the Seventh Circuit in the instant matter is completely contrary to these and other circuit holdings in that it would allow general compensatory damages absent individualized injury, as opposed to merely nominal damages, or a denial of damages.

Other Circuit Courts of Appeals have recognized a right to recover general compensatory damages where some intangible injury such as mental distress and humiliation is shown, but in contrast to the Circuit Court of Appeals for the Seventh Circuit, would only give nominal damages absent a showing of the individualized injury or pecuniary loss.

In affirming an award of $1.00 nominal damages in a housing discrimination case, the Court of Appeals for the Second Circuit, in *Fort* v. *White*, 530 F. 2d 1113 (2nd Cir. 1976), refused to consider general compensatory damages and stated at page 1116:

> Here there was not only no proof of humiliation but the complaint, while seeking actual damages, makes no mention of humiliation or embarrassment. In view of the plaintiffs' waiver and the absence of any evidentiary basis which would allow the trier of fact to estimate or assess such damages, we find no error in the denial of compensatory damages.

The same circuit in the case of *Stolberg* v. *Members of Bd. of Tr. for State Col. of Conn.*, 474 F. 2d 485 (2nd Cir. 1973), allowed special compensatory damages in a wrongful dismissal, for actual out of pocket loss. General compensatory damages, such as for humiliation, distress and injury to reputation, were denied for failure of proof and being "wholly speculative."

The Third Circuit Court of Appeals recognized as early as 1965 nominal damages for violation of civil rights. In *Basista* v. *Weir*, 340 F. 2d 74 (3rd Cir. 1965) the Court stated at page 87:

> As a matter of federal common law it is not necessary to allege nominal damages and nominal damages are proved by proof of deprivation of a right to which the plaintiff was entitled.

In *Knuckles* v. *Prasse*, 435 F. 2d 1255 (3rd Cir. 1970), the Court of Appeals of the Third Circuit denied monetary damages even though they found violation of the Civil Rights Act.

The recognition of nominal damages and no award for general compensatory damages absent proof of individualized injury was restated by the Court of Appeals for the Third Circuit in the cases of *Paton* v. *LaPrade*, 524 F. 2d 862 (3rd Cir. 1975) and *Tyrell* v. *Speaker*, 535 F. 2d 823 (3rd Cir. 1976). In *Tyrell* v. *Speaker*, the Court reduced a nominal damage award of $500 to $1.00 stating that, "as a matter of law nominal damages may not exceed one dollar on this record."

The Circuit Courts of Appeals for the Fifth and Sixth Circuits both recognized an award of nominal damages and no general compensatory damages absent proof of individualized injury such as humiliation and embarrassment. *Schiff* v. *Williams*, 519 F. 2d 257 (5th Cir. 1975); *Sexton* v. *Gibbs*, 446 F. 2d 904 (5th Cir. 1971); *Ault* v. *Holmes, Preston* v. *Cowen*, (consol.), 506 F. 2d 288 (6th Cir. 1974).

However, in *Ault* and *Preston*, the Court of Appeals for the Sixth Circuit affirmed an award of $25.00 nominal damages to

Preston instead of the traditional $1.00 and affirmed a denial to Ault of compensatory damages. The District Court in *Ault* v. *Holmes*, 369 F. Supp. 288 (D. C. Ky. 1973) recognized the unsettled nature of awarding damages for constitutional violations, stating at page 293:

> In *Jones* v. *Rundle*, 358 F. Supp. 939, 1973 (D. C. E. D. Pa.), Judge Body held that in a civil rights action brought by prisoners, no damages should be awarded, even though a breach of constitutional rights was shown, inasmuch as the law was very unsettled in that field at the time of the constitutional violations. As the District Judge pointed out in that case, to impose liability for damages upon state wardens and other state correctional authorities in prisoner civil rights cases where the law has not been finally settled by an authoritative Supreme Court or Circuit Court decision, would discourage qualified persons from accepting such positions.

Many District Courts recognize the principle that general compensatory damages cannot be awarded absent proof of individualized injury or pecuniary loss and that in those instances the option exists to award nominal damages. *International Prisoners Union* v. *Rizzo*, 356 F. Supp. 806 (E. D. Pa. 1973); *Tracy* v. *Robbins*, 40 FRD 108 (D. C. S. C. 1966); *Bell* v. *Gayle*, 384 F. Supp. 1022 (N. D. Tex. 1974) ($1.00 for each plaintiff); *Bradley* v. *School Bd.*, 324 F. Supp. 401 (E. D. Va. 1971); *Cordova* v. *Chonko*, 315 F. Supp. 953 (N. D. Ohio 1970). (nominal damages were $.01); *Washington* v. *Official Court Stenographer*, 251 F. Supp. 945, 947 (E. D. Pa. 1966); *Callahan* v. *Sanders*, 339 F. Supp. 814 (N. D. Ala. 1971) (while recognizing some courts give nominal damages, it here refused to give 50,000 plaintiffs $1.00 each).

In *Manfredonia* v. *Barey*, 401 F. Supp. 762 (E. D. N. Y. 1975) the District Court noted that damages for violations of civil rights are necessarily "left up to the discretion of the trier of the fact in the absence of out of pocket or other loss or injury."

Finally, in *Jones* v. *Superintendent*, 370 F. Supp. 488 (W. D. Va. 1974) the District Court in realizing that a wrong may have been done awarded no damages since there was no real injury or actual damages to the plaintiff.

It is apparent that there is widespread disagreement among the Courts of Appeals as to the proper federal rules of damages surrounding civil rights violations. The Court of Appeals for the Seventh Circuit is in clear conflict with the majority decisions of other Circuit Courts by holding that general compensatory damages must be awarded as a matter of law when any violation of civil rights has been established. Petitioners believe that it is important for the Supreme Court to clarify not only whether or not the Circuit Court of Appeals for the Seventh Circuit holding should stand as the new federal rule of damages in this area, but also whether or not there can be a denial of both general compensatory damages or nominal damages by the trier of the fact.

CONCLUSION.

For the foregoing reasons the petitioners respectfully submit that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 76-1649

JARIUS PIPHUS, a Minor and GENEVA PIPHUS, Guardian ad Litem for Jarius Piphus,

Plaintiffs-Appellants,

vs.

JOHN D. CAREY, et al.,

Defendants-Appellees.

No. 76-1652

PEOPLE UNITED TO SAVE HUMANITY, SILAS BRISCO, a Minor and CATHERINE BRISCO, Guardian ad Litem for Silas Brisco,

Plaintiffs-Appellants,

vs.

JOHN D. CAREY, et al.,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 74-C-303 and 73-C-2522—George N. Leighton, *Judge.*

Argued October 18, 1976—Decided November 22, 1976

Before CLARK, *Associate Justice* (Retired),* CASTLE, *Senior Circuit Judge,* and TONE, *Circuit Judge.*

TONE, *Circuit Judge.* The District Court found that the rights of the plaintiff public school students to procedural due process

* The Honorable Tom C. Clark, Associate Justice (Retired) of the Supreme Court of the United States, is sitting by designation.

had been violated by suspensions without hearings, and that the defense of good faith was not available to the defendant school authorities. Nevertheless, the court refused to award damages because of the lack of evidence of injury, and omitted awarding equitable or declaratory relief although acknowledging that such relief would be appropriate. We reverse, holding that damages and equitable and declaratory relief should have been granted.

The suspensions in both cases were for 20 days. One plaintiff was kept out of school for 8 days and the other for 17 days before their readmission resulting from preliminary injunction proceedings. After hearing both cases on their merits on stipulated records, the District Court held that both suspensions had been ordered without the due process guaranteed by the Fourteenth Amendment and that the defense of good faith was not available to the defendants. Inasmuch as the defendants do not question either holding on appeal,[1] the District Court's determination is conclusive on the liability issue. After finding the defendants liable, the court went on to observe that declaratory relief would be appropriate and that references to plaintiffs' suspensions should be deleted from their records. In dealing with plaintiffs' damage claim, however, the court held that, while the defendants' failure to satisfy the criteria for the defense of good faith[2] "technically" entitled plaintiffs to damages, none

1. Because the District Court dismissed the complaint, defendants were not required to cross appeal in order to challenge this determination. Had they raised the liability issue on appeal and persuaded us that it was wrongly decided, we would have been procedurally correct in affirming on that ground. *Dandridge* v. *Williams*, 397 U. S. 471, 475 n. 6 (1970).

2. The court found that, although there was no evidence that the defendants acted maliciously, and therefore the first test of *Wood* v. *Strickland*, 420 U. S. 308 (1975), was satisfied, the defendants "should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs," and therefore the second test enunciated in that decision was not met. See also *Hostrop* v. *Board of Junior College District No. 515*, 523 F. 2d 569, 577 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1748 (1976).

had been proved. The court dismissed the complaints, ordering no relief whatsoever.

Plaintiffs, in support of their damage claim, attempted to show the value of each missed day of school by submitting data on cost per pupil per day. After the court's decision, plaintiffs filed a "motion to amend the final order," in which they sought reconsideration of the damage issue. Judge McLaren, who rendered the initial decision, reopened the issue of damages, and plaintiffs then submitted data on non-resident tuition charges. Following Judge McLaren's death, the case was reassigned to Judge Leighton, who denied the post-trial motions.

The damage issue is controlled by *Hostrop* v. *Board of Junior College District No. 515*, 523 F. 2d 569 (7th Cir. 1975), *cert. denied*, 96 S. Ct. 1748 (1976). We recognized in that case that non-punitive damages for the injury which is "inherent in the nature of the wrong" are recoverable for a violation of the right to procedural due process, as they are for the deprivation of voting rights or other constitutional rights. *Id.* at 579-580. This is so even if, as in the case at bar, there is no proof of individualized injury to the plaintiff, such as mental distress (which, when found to have been suffered, would enhance the general damages recoverable), and even if no pecuniary loss is shown. The amount of the damages to be awarded when no individualized injury is shown is dependent on the nature of the wrong. The amount fixed by the District Court should be neither so small as to trivialize the right nor so large as to provide a windfall.[3]

Accordingly, the District Court erred in not allowing damages even though no individualized injury was shown by the stipulated record. The court also erred in not considering the possibility of special damages for the school days plaintiffs lost as a

3. See, *e.g.*, *Seaton* v. *Sky Realty Co.*, 491 F. 2d 634, 637 (7th Cir. 1974); *Sexton* v. *Gibbs*, 327 F. Supp. 134, 143 (N. D. Tex. 1970), *aff'd*, 446 F. 2d 904 (5th Cir. 1971), *cert. denied*, 404 U. S. 1062 (1972); *Magnett* v. *Pelletier*, 488 F. 2d 33, 35 (1st Cir. 1973).

result of their suspensions. Both in the stipulated record and in support of their post-trial motion, plaintiffs submitted data (to which no objection based on the rules of evidence appears to have been made) tending to show the pecuniary value of the time lost. These damages, however, and any others flowing from the suspension, as distinguished from the deprivation of a procedural due process right, would be recoverable only if a plaintiff's suspension would not have occurred absent the due process violation. *Cf. Hostrop, supra,* 523 F. 2d at 579. On remand, therefore, as counsel for plaintiffs recognized at oral argument, if a plaintiff seeks to recover damages flowing from his suspension, the defendants will be entitled to offer evidence showing that there was just cause for the suspension and that therefore he would have been suspended even if a proper hearing had been held. If the District Court finds that to be the case, no damages may be recovered for suspension, and only damages resulting from the deprivation of due process rights may be awarded.

Equitable relief, however, should not depend upon whether plaintiffs would have been suspended in any event. The suspension orders that were entered were invalid because of the due process violations, and the defendants have not chosen to institute a new suspension proceeding that would have afforded a basis for a valid suspension order against either plaintiff. Even though they advise us that they have expunged all reference to the invalid suspensions from the plaintiffs' records, declaratory and injunctive relief consistent with the judgment should be granted.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
for the Northern District of Illinois
Eastern Division

PUSH, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

JARIUS PIPHUS, et al.,
Plaintiffs,
vs.
JOHN D. CAREY, et al.,
Defendants.

Nos. 73 C 2522 and 74 C 303 Consolidated.

MEMORANDUM OPINION AND ORDER

These consolidated cases are civil rights actions challenging the constitutionality of rules and procedures used by the Board of Education of the City of Chicago (the Board) in suspending elementary and high school students from its schools. The cases have been submitted to the Court for final adjudication on stipulated records which include certain depositions, documents, factual stipulations, and affidavits. This opinion will constitute the Court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Plaintiffs in No. 73 C 2522 are Silas Brisco, a student; his mother, Catherine Brisco, and People United to Save Humanity (PUSH), a not-for-profit Illinois corporation primarily composed of minority group members.[1] Plaintiffs in No. 74 C 303

1. Defendants have challenged the standing of PUSH to be a party plaintiff in 73 C 2522. In a memorandum opinion dated June

(Continued on next page)

are Jarius Piphus, a student; and his mother, Geneva Piphus. Defendants in each action are members of the Board or agents of the Board who allegedly participated in the suspensions in question or who knew or reasonably should have known that unconstitutional suspensions would occur.

During the 1972-73 school year, Silas Brisco was enrolled in the fifth grade at Clara Barton Elementary School which is located on the southside of the City of Chicago. During this period the Barton School was in transition from a predominantly white to a predominantly black enrollment. Also during the 1972-73 school year, several black male students began to attend school wearing earrings. The principal and other school administrators believed that these earrings denoted gang membership and thus a decision was made that in the interest of student safety male students would be prohibited from wearing earrings. The district superintendent with jurisdiction over the Barton School, Steven Brown, was notified of this decision and approved of the prohibition.

Subsequent to the establishment of the earring rule, certain male students were orally informed of the existence of the earring rule and were warned that further wearing of an earring could result in a suspension. There were no other published rules in effect at the Barton School at the time the earring prohibition was adopted nor was the earring rule reduced to written form. Silas Brisco, however, had actual notice of the earring ban.

Starting in May 1973, Silas Brisco began to wear an earring to school in contravention of the rule. On one occasion in May

(Continued from preceding page)

13, 1974, this Court held that PUSH alleged facts entitling it to standing. Since then PUSH has filed an uncontroverted evidentiary affidavit which factually supports the allegations contained in the second amended complaint. PUSH therefore has established as a factual matter that it or its members have experienced specific injury in fact and come within the zone of interests to be protected. Its standing to sue has therefore been established. *Warth* v. *Seldin*, 95 S. Ct. 2197 (1975).

1973, he was told to remove the earring or face suspension. At that time he refused and was suspended for a portion of the school day until his mother conferred with District Superintendent Brown; Brisco then removed the earring and was readmitted.

When school reconvened in the fall of 1973, the earring problem reoccurred. On September 11, 1973, Brisco again wore an earring to school. During the course of the day he was called to the school office by the principal, Rudolph Jezek, and Gordon Sharp, assistant principal. They ordered Silas to remove the earring in question. Silas refused, asserting that wearing earrings did not denote gang membership, but rather was a symbol of black pride.

Following his refusal to remove the earring, Principal Jezek conferred with District Superintendent Brown, Brown informed Jezek that the earring ban was still in effect. Brisco was then informed that unless he immediately complied with the rule, he would be suspended. He continued to refuse to remove the earring.

Assistant Principal Sharp then left the immediate central office area to telephone Brisco's mother and write up a suspension report form. Mrs. Brisco then came to Barton School where a conference was held with Jezek and Sharp. Jezek informed Mrs. Brisco of the impending suspension if Silas did not comply wtih the earring rule. Mrs. Brisco supported her son's behavior and thus a 20-day suspension was imposed. Ultimately, Brisco served 17 days of the suspension; he was voluntarily readmitted while a motion for preliminary injunction was pending before this Court. In sum, at no time before or after Silas' suspension did an independent observer hear evidence with respect to the factual issue of what the wearing of an earring actually denoted.

The facts surrounding the suspension of Jarius Piphus are equally straightforward. During the 1973-74 school year he was a student at Chicago Vocational High School (CVS). The rules

of CVS prevented cigarette smoking and bringing intoxicating substances onto school property. Jarius had actual notice of these rules. On January 13, 1974 defendant Reginald Brown, principal of CVS, observed plaintiff and another student passing an irregularly shaped cigarette between them. At that time Piphus was on school property, near the school parking lot. As Brown approached Piphus, he smelled smoke which he believed to be the odor of marijuana. Mr. Brown also observed Piphus attempting to pass cigarette papers to the other student. Cigarette papers can be used for preparing marijuana cigarettes. When the boys saw Mr. Brown they discarded the cigarette. The object may have been thrown into nearby hedges or discarded on the way to the school office. No attempt was made to recover the object although Piphus has consistently denied that he was smoking marijuana.

Despite the denial, Mr. Brown accompanied Piphus and the other student to the school's disciplinary office and there told the assistant principal to follow the "usual procedure" imposing a 20-day suspension for violation of the rule against smoking marijuana. Piphus was then formally suspended by the assistant principal, although Principal Brown admits that it was his decision to suspend him.

Subsequently, two meetings were held between school officials, Piphus, his mother, sister, and legal representatives from the Mandel Legal Aid Clinic. These meetings were not fact finding hearings but rather were for the purpose of explaining actions previously taken. At the second of these meetings, the Mandel representatives were excluded when they attempted to tape-record the proceedings. Thereafter, Piphus' suspension was reduced to five days by the District Superintendent. At the same time, Judge Bauer entered a temporary restraining order readmitting plaintiff. As a result of the incident in question, Piphus missed eight days of classes.

Two legal issues have been raised by the above-described suspensions: (1) whether students were given sufficient prior

notice of conduct which was prohibited, and (2) whether adequate hearings were held at the time Brisco and Piphus were suspended.

At the time of the incidents in question the Board rule governing suspensions read as follows:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Each such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statements of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil." Rule 6-9 of the Rules of the Board of Education of the City of Chicago (1973).

Plaintiffs argue that the language "gross disobedience or misconduct" is unconstitutionally broad and vague, particularly in an arguably First Amendment context such as the Brisco case. Were the "gross disobedience or misconduct" language the sole notice given to forewarn a student of forbidden conduct, the Court would agree with plaintiffs. See *Soglin* v. *Kauffman,* 418 F. 2d 163 (7th Cir. 1969); *Linwood* v. *City of Peoria,* 463 F. 2d 763 (7th Cir. 1972). However, both students here were given actual notice of reasonably narrow regulations which gave specific meaning to the terms in dispute. *Linwood* demonstrates that this type of procedure is constitutionally sufficient. In *Linwood* the court stated the language "gross disobedience or misconduct"—

> "does not purport to define or proscribe specific acts or omissions which may be penalized by suspension or expulsion. But it does furnish the local school authority with a general guideline or standard—that student disobedience or misconduct must be 'gross' to justify its being made a ground for suspension or expulsion." 463 F. 2d at 768.

Thus, the gross disobedience language was not intended to be a self-executing regulation of student conduct but rather was

intended to be a generalized grant of power exercised by instituting more specific regulations. Here such specific regulations were promulgated by the individual schools involved, providing adequate actual notice of forbidden conduct.[2]

Plaintiffs also argue that Brisco and Piphus were not accorded sufficient hearings to test the evidentiary basis for their suspensions. In *Goss* v. *Lopez*, 95 S. Ct. 729 (1975), the Supreme Court held that students who were temporarily suspended from publicly supported schools were entitled to hearings which comport with minimal requirements of due process (an informal hearing).[3] Unless the student's presence poses a con-

2. Plaintiffs properly note that the Board has failed to issue one generalized set of specific narrowing regulations, nor has the Board required each school to issue appropriate regulations. As a consequence, some schools have no such formal regulations while other schools promulgate regulations on an *ad hoc* or word-of-mouth basis, while yet other schools have a quite formal set of written regulations. Despite this range of behavior, the Court has not been presented with any evidence of specific suspensions of students from schools without any narrowing regulations. Because educational discipline presents problems not easily resolved by constitutional judicial inquiry, until such a case is presented in a complete factual context, this Court expresses no view as to what type of remedy would be appropriate in such a case.

3. After *Goss* was decided the Board revised its suspension practices. Rule 6-9 now reads:

> "For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding . . . ten school days for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such susupension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil.
>
> "Prior to a suspension of 10 days or less the student shall be given oral or written notice of the charges against him and an informal hearing with an explanation of the basis of the charge and an opportunity to explain his version of the facts. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and informal hearing should follow as soon as practicable."

(Continued on next page)

tinuing danger to persons or property or an ongoing threat of disrupting the academic process, the hearing should be held before a suspension is imposed. The Court also stated that suspensions in excess of 10 days, expulsions, or unusual circumstances may warrant more formal hearings. Here both suspensions potentially exceeded 10 days, triggering the need for more formal procedures. Additionally, the first amendment implication of the Brisco case also warrants stricter procedural

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The following guidelines were also adopted:

> "1. No student shall be suspended from school without using the authorized procedures. Every suspension shall be reported immediately to the District Superintendent using the appropriate forms and also reported to the parent or guardian of the pupil with a full statement of the reasons for the suspension.
>
> "2. A student facing suspension of ten days or less shall be given oral or written notice of the charges against him and an informal hearing arranged by the principal. At the hearing, the student will be given an explanation of the basis of the charges as well as an opportunity to present his version of the facts.
>
> "3. A student facing suspension may request that a third party—such as a parent, school staff member or another student be present during the informal hearing.
>
> "4. In those cases where a student's presence poses a continuous danger to persons or property or is an ongoing threat of disrupting the academic process, the student may be immediately removed from school. In such cases the necessary notice and informal hearing should follow as soon as practicable.
>
> "5. Every effort should be made to ensure the student's receipt of class assignments for the period of the suspension. The academic grade of a suspended student will not be affected when class assignments are completed satisfactorily in keeping with standards applicable to all students set by the student's teacher. Teachers have the further option of testing pupils upon their return to class on the work submitted."

For the reasons stated in footnote 2, the Court believes that the constitutionality of these new regulations cannot be tested until a full factual background is developed. Moreover, the parties have failed to demonstrate that a true case or controversy presently exists with respect to these rules. This Court therefore should not render an essentially advisory opinion on the constitutionality of the rules.

standards before a suspension can be imposed. *Tinker* v. *Des Moines School Dist.*, 393 U. S. 503 (1969).

This Court's prior opinion in *Quintanilla* v. *Carey*, 75 C 829 (N. D. Ill. March 31, 1975) sets out the basic contours of a formal school disciplinary hearing:

> (1) the student should be given a prehearing notice of the specific charges against him, including a short summary of the evidence the school administrator intends to rely upon;
>
> (2) the student should have the right to be represented by counsel (or another responsible advocate) at the hearing;
>
> (3) the student should be able to present witnesses on his behalf and cross-examine witnesses;
>
> (4) the student, at his expense, should be able to make a tape recording or transcript of the hearing;
>
> (5) an impartial hearing officer should preside generally. This would preclude a witness from serving as the hearing officer and, in some instances, a school administrator not from the same school as the accused student would be necessary.

See also *Mills* v. *Board of Education of Dist. of Columbia*, 348 F. Supp. 866, 880-84 (D. D. C. 1972); *Vail* v. *Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 603-604 (D. N. H. 1973).*

Measured against these generalized requirements it is apparent that both Brisco and Piphus failed to receive adequate disciplinary hearings. The decisions to suspend both of them were made by their major factual accusers. Neither was afforded an opportunity to present evidence in his behalf at a meaningful time and in a meaningful manner. Any conferences with respect to the suspensions in question were held after an administrative decision had already been made. Piphus' attorneys were excluded from his post-suspension conference and he was not permitted to make a tape recording of the conference.

Since plaintiffs have established that unconstitutional suspensions occurred, we must consider the form of relief to be provided. Undoubtedly plaintiffs are entitled to a declaration that the suspensions in question were unconstitutional. Plaintiffs' school records should be corrected, deleting any reference to these suspensions. Plaintiffs have also asked for an award of actual and punitive money damages. A recent Supreme Court and several recent Seventh Circuit opinions set forth the standard for measuring whether monetary liability is appropriate. *Wood* v. *Strickland*, 95 S. Ct. 992 (1975); *Minns* v. *Board of Education*, No. 74-1534 (7th Cir. Sept. 24, 1975); *Hostrop* v. *Board of Junior College Dist. No. 515*, No. 74-1915 (7th Cir. Sept. 24, 1975). An official is immune by reason of good faith for liability for damages for a constitutional violation if he is:

> "acting, not with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff], but 'sincerely and with a belief that he is doing right.' Second, if he meets the first test, he is liable only 'if he knew or reasonably should have known' that his act 'would violate the constitutional rights of the plaintiff' " *Hostrop, supra*, Slip Op. p. 10, quoting *Wood, supra*, 95 S. Ct. at 1001.

Here the record is barren of evidence suggesting that any of the defendants acted maliciously in enforcing disciplinary policies against the plaintiffs. Undoubtedly defendants believed that they were protecting the integrity of the educational process. With respect to the second element of the *Wood* test, it is apparent that shorter suspensions as contemplated by *Goss* might raise the defense that defendants are not "charged with predicting the future course of constitutional law" and thus cannot be held responsible for the legal developments anticipated in *Goss*. The initial length of suspensions imposed in the instant case seems to indicate, however, that under the *Linwood* rationale, defendants should have known that plaintiffs were entitled to some type of adjudicative hearing. The potential 20-day length

of the suspensions was more analogous to an expulsion than a *Goss*-type suspension. Defendants should have known that a lengthy suspension without any adjudicative hearing of any type would violate the constitutional rights of plaintiffs. Technically, therefore, plaintiffs should be entitled to damages.

However, damages must be proved with at least a reasonable degree of certainty. *Hoefferle Truck Sales Inc.* v. *Divco-Wayne Corp.*, 74-1481 (7th Cir. Oct. 6, 1975); *Classic Bowl, Inc.* v. *AMF Pinspotters, Inc.*, 403 F. 2d 463 (7th Cir. 1968). Plaintiffs put no evidence in the record to quantify their damages, and the record is completely devoid of any evidence which could even form the basis of a speculative inference measuring the extent of their injuries. Plaintiffs' claims for damages therefore fail for complete lack of proof. Accordingly, the complaints are dismissed.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: November 5, 1975.